FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

December 10, 2008

AGAPITO ASSOCIATES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 2008-1451-R
	:	Citation No. 7697010; 7/24/2008
v.	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Crandall Canyon Mine Id. No. 42-01715

ORDER GRANTING MOTION FOR RECONSIDERATION
ORDER GRANTING LIMITED STAY

This case is before me on a notice of contest filed by Agapito Associates, Inc. ("Agapito") against the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Mine Act"). On September 3, 2008, the Secretary of Labor filed a motion to stay this proceeding because the U.S. Attorney for the District of Utah is conducting a criminal investigation into a fatal accident at the Crandall Canyon Mine (the "Mine"). The case involves a citation issued to Agapito following the coal pillar failure at the Crandall Canyon Mine on August 6, 2007, that resulted in the deaths of six miners. Agapito opposed the motion primarily because it is not seeking an adjudication of the merits of the citation at this time. Instead, it is seeking a ruling that it was not subject to Mine Act jurisdiction at the Mine.[1]

By order dated September 12, 2008, I denied the Secretary's motion to stay. (30 FMSHRC ___) On September 29, 2008, the Secretary filed a motion requesting that I reconsider my order denying her motion to stay. The Secretary filed a brief to support her motion and Agapito filed a brief in opposition. I granted the Secretary's request to file a reply to Agapito's opposition and I granted Agapito's motion to file a sur-reply.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary argues that reconsideration is warranted for a number of reasons. First, she argues that, by analogy, a recent U.S. Supreme Court precedent makes clear that whether Agapito falls within the definition of "mine operator" in section 3(d) of the Mine Act is an element of the

[1] Agapito entered a "special appearance for the purpose of contesting the Federal Mine Safety and Health Review Commission's jurisdiction over the Contestant pursuant to section 3(d) of the" Mine Act.

claim rather than a question of subject matter jurisdiction. As a consequence, this issue should not be adjudicated as a threshold matter but should be considered when adjudicating the merits of the citation. The Secretary also contends that, although she issued a detailed accident investigation report following the accident at the Crandall Canyon Mine, this report was not written to resolve the issue as to whether Agapito was an independent contractor subject to the requirements of the Mine Act. Indeed, several key Agapito officials refused to be interviewed during MSHA's investigation. As a consequence, Agapito's suggestion that the jurisdiction issue should be resolved on the basis of her accident investigation report is not acceptable. Finally, the Secretary states that the facts necessary to resolve the issue of Agapito's status as an independent contractor will inexorably be intertwined with the facts necessary to establish that a violation of a safety standard occurred.[2] She believes that Agapito's arguments require a close examination of the services it provided to the mine owner/operator.[3] The Secretary now asks that the case be stayed for 90 days, rather than for an indefinite period, and she states that she will provide a status report on the progress of the criminal investigation at that time.

Agapito argues that reconsideration of my order denying the motion for a stay is not warranted. There has been no change in controlling law, the order did not contain a clear error of law, and the order will not result in any injustice. Agapito notes that I followed the guidelines set forth in *Buck Creek Coal*, 17 FMSHRC 500 (April 1995) when I determined that the case should not be stayed. Agapito argues that none of the Secretary's arguments necessitate reconsideration of my original order denying the motion for stay. Agapito maintains that the Secretary's jurisdictional authority to cite it as an independent contractor is a threshold matter. In addition, the narrow issue of whether Agapito was an independent contractor can be resolved without interfering with the criminal investigation.

II. RESOLUTION OF THE ISSUES

I can dispose of the first issue rather quickly. Agapito argues that I should not entertain the motion for reconsideration because the Secretary has not established that reconsideration is warranted. It argues that the Commission has held that reconsideration "should not be granted, absent highly unusual circumstances, unless the . . . court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law." *Island Creek Coal Co.*, 23 FMSHRC 138, 139 (Feb. 2001) (emphasis in original). In that case, however, the Commission was construing Commission Procedural Rule 78, 29 C.F.R. § 2700.78,

---

[2] The citation at issue alleges a violation of 30 C.F.R. § 75.203(a). It states that Agapito "inaccurately evaluated the conditions and events at the mine when determining if areas of the mine were safe for mining" and, based on its results, "recommended to the operator that mining methods were safe and pillar and barrier dimensions were appropriate when in fact they were not."

[3] The parties refer to the owner operator as GRI/UEI, which stands for Genwal Resources, Inc., and UtahAmerican Energy, Inc.

which concerns reconsideration of a final decision of the Commission. In the present case, the Secretary is asking for reconsideration of an interim order issued by an administrative law judge at the outset of a case. I find that I have the authority and discretion to reconsider my order of September 12 even where the Secretary has not met the criteria set forth in *Island Creek*. I also find that the Secretary has presented sufficient justification for me to reconsider my order denying the motion for stay. As a consequence, I reject Agapito's argument that I should not consider the Secretary's motion.

A review of the key provisions of the Mine Act is helpful. Section 4 of the Mine Act, entitled "Mines Subject to Act," provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each *operator* of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803 (Emphasis added). Section 104(a) of the Mine Act grants the Secretary the authority to issue a citation if the Secretary's representative believes that "an operator of a coal or other mine subject to this Act" has violated a safety or health standard. The term "operator," as used in the Mine Act, is defined in section 3(d) as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any *independent contractor performing services or construction at such mine*." 30 U.S.C. §802(d) (emphasis added). Section 105(d) of the Mine Act grants jurisdiction to the Commission to adjudicate contests of citations and orders issued by MSHA as well as contests of the Secretary's proposed penalties. 30 U.S.C. § 815(d). Thus, these provisions of the Mine Act grant the Secretary the authority to issue a citation to an independent contractor performing services at a coal or other mine and the Commission has the authority to adjudicate a contest of the citation and the associated civil penalty.

The Crandall Canyon Mine clearly fits within the definition of "coal or other mine" in section 3(h)(1) of the Mine Act. The issue raised by Agapito at this point in this proceeding is whether it was an operator as result of being an "independent contractor performing services at a coal or other mine." Agapito contends that it was not an independent contractor but was a geological consulting firm that provided "advice, analysis, and consultation to mine operators" from its office in Grand Junction, Colorado. (A. Opposition to Sec'y's Motion to Stay). It is clear that Agapito provided services related to underground mining at Crandall Canyon Mine. Agapito would like the independent contractor issue immediately adjudicated before the U.S. Attorney initiates or completes a criminal investigation.

The first question raised by the Secretary in the motion for reconsideration concerns her argument that the issue of Agapito's status as an independent contractor is an element of the claim to be adjudicated in due course rather than a threshold question of subject matter jurisdiction. She relies in large part on the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500; 126 S. Ct. 1235 (2006). She did not discuss this decision in her original motion requesting a stay.

In *Arbaugh*, the Supreme Court discussed the "distinction between two sometimes confused or conflated concepts: federal-court 'subject matter' jurisdiction over a controversy;

and the essential ingredients of a federal claim for relief." 546 U.S. 503, 126 S.Ct. 1238. Ms. Arbaugh prevailed in a case alleging sexual harassment at work under Title VII of the Civil Rights Act of 1964. Two weeks after the trial judge entered judgment on the jury verdict in her favor, the employer moved to dismiss the case for want of federal subject matter jurisdiction. For the first time in the litigation, the employer asserted that it had fewer that 15 employees on its payroll and it was not subject to being sued under Title VII. The trial court stated that it had no choice but to grant the motion because it believed that the 15-employee requirement in Title VII was jurisdictional. The court of appeals affirmed the district court's dismissal of the case.

The Supreme Court reversed because it determined that the employee-numerosity requirement is directly related to the substantive adequacy of Arbaugh's Title VII claim rather than the jurisdiction of the court to hear the case. As a consequence, the employer could not raise this issue after the close of the trial. The court stated that the objection that a federal court lacks subject matter jurisdiction may be raised by a party, or by the court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. An argument that the plaintiff failed to establish an element of a claim, on the other hand, must be made in a pleading, a motion, or at trial on the merits.

The Court recognized that federal courts, including the Supreme Court, have often "been less than meticulous" when analyzing the "subject matter jurisdiction/ingredient-of-claim-for-relief dichotomy." 546 U.S. 511; 126 S. Ct. 1242. The Court stated that the basic statutory grants of jurisdiction for federal courts are 28 U.S.C. §§ 1331 and 1332. The Civil Rights Act of 1964 also contains a provision granting jurisdiction to federal courts. 42 U.S.C. § 2000e-5(f)(3).

The Supreme Court looked at several factors in reaching its conclusion that the 15-employee provision related to the merits of the case. First, subject matter jurisdiction can never be waived and courts have an independent obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party. Yet, nothing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met. Second, the trial judge, not the jury, determines whether the court has subject matter jurisdiction in a case. The judge is allowed to review the evidence to resolve a jurisdictional dispute if the facts are contested. If satisfaction of an essential element of a claim for relief is at issue, however, the jury is the proper trier of any contested facts. The court concluded that the factual disputes concerning whether the employer was exempt from liability because of the 15-employee provision in the statute should have been resolved by the trier of fact and not the trial judge.

In the instant case, the Secretary argues that the status of Agapito as an independent contractor is not a question of subject matter jurisdiction. The definition of a mine operator is contained in section 3(d) of the Mine Act and this definition includes independent contractors. It is significant that this definition was not included in the section 105(d) of the Mine Act, which grants the Commission jurisdiction to hear contests of citations, orders, and civil penalties. As a consequence, the Secretary contends that Congress clearly did not intend for the issue whether an

entity is an independent contractor to be a jurisdictional one. The Commission has jurisdiction in this case because Agapito contested a citation that was issued to it by MSHA, not because Agapito is an independent contractor.

Agapito argues that *Arbaugh* is wholly inapplicable to the issues in this case. Federal district courts enjoys broad statutory authority to hear cases arising under federal law under 28 U.S.C. § 1331. The Supreme Court rejected the notion that the district court lacked jurisdiction over a case because of limitations elsewhere in the particular statute involved. The Commission, however, does not have jurisdiction over this case if Agapito is not an operator as that term is used in the statute. Congress did not grant the Commission broad plenary jurisdiction over all issues arising under the Mine Act.

Agapito also argues that, even if the principles set forth in *Arbaugh* are found to apply, that does not end the inquiry. It contends that the court should determine whether Agapito was an independent contractor under the Mine Act as a threshold matter in any event. If Agapito was not an independent contractor, then the citation should be vacated without litigating the merits of the citation. Determining whether Agapito was an independent contractor before adjudicating the merits conserves the resources of the parties and the Commission.

I hold that a resolution of any factual disputes necessary to determine whether Agapito was an independent contractor under the Mine Act is a matter for the trier of fact. In addition, as the administrative law judge assigned this case, I do not have an independent obligation to determine whether a party is an operator or an independent contractor subject to the Mine Act in the absence of a challenge from any party. I may choose to exercise my discretion to raise this issue at a hearing, but I am not obligated to do so. To put it another way, a party contesting a citation cannot seek to have the citation vacated after the administrative law judge's decision has been issued on the basis that it is not an independent contractor if it never previously raised that issue. Thus, the Commission's subject matter jurisdiction over a proceeding does not depend on a party's status as an "operator." Agapito entered a limited appearance to contest the instant citation. As set forth in section 105(d) of the Mine Act, the Commission has jurisdiction in this case because Agapito contested the citation and such jurisdiction is not dependent on Agapito's status as an independent contractor. I am persuaded by the Secretary's arguments on this issue.

The next issue is whether I should determine if Agapito was an independent contractor before reaching the substantive issues alleged in the citation. The Secretary argues that because "the question whether Agapito is an operator is an element of the claim," that issue should be determined "in the due course of the litigation, with the other elements of the claim, rather than as a threshold issue." (S. Br. in support of motion at 8). The Secretary argues that a bifurcation of the case would result in piecemeal litigation that would waste judicial resources and require depositions of the same people multiple times.

In addition, the Secretary states that adjudication of this issue on the basis of the accident report is unworkable because the accident report was never intended to be used to establish

Agapito's status as an independent contractor. This issue is too important to be decided on the basis of a technical accident report, designed to discuss the root causes of the accident, but not designed to serve as a definitive recitation of the facts necessary to establish that Agapito was an independent contractor. Moreover, some of Agapito's agents refused to participate in MSHA's accident investigation. As a consequence, the information in the report is not complete and the Secretary states that she would need to present additional evidence to establish that Agapito was an independent contractor at the time the citation was issued. She believes that she will need to conduct discovery in order to prepare for trial on that issue.

The Secretary argues that "allowing evidence to be obtained and publicly disclosed on this issue . . . would have an adverse impact on the pending criminal investigation." *Id.* The Secretary cites the letter she received from the U.S. Attorney asking that this case be stayed because Agapito is the subject of a criminal investigation. The letter dated September 3, 2008, states:

> The evidence gathered to determine criminal liability may significantly overlap with the evidence needed to prove civil liability. Consequently, this office has an interest in insuring that neither [Agapito] nor any other entity obtain discovery from a civil proceeding that would unduly circumvent the more limited scope of discovery available in criminal matters. *See Sec. & Exch. Comm'n v. Chestman*, 861 F. 2d. 49, 50 (2nd Cir. 1988).

(S. Br. in support of Motion for Stay, Ex. A) The letter goes on to state:

> This interest in limiting civil discovery applies in a civil proceeding involving solely jurisdictional questions. For example, to litigate whether [Agapito] is an operator of a mine, MSHA would have to disclose all relevant information obtained through its investigation about [Agapito's] relationship to the other entities that operated the Crandall Canyon Mine. Given that "relevance" in a civil matter is anything that is "reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b)(1), allowing discovery on this jurisdictional issue could easily "circumvent the more limited discovery available in criminal matters." *Chestman,* 861 F. 2d at 50. Further, any discovery disclosed in the civil proceeding would provide potential targets with access to witnesses and documents to which they would not otherwise be entitled while the investigation is pending.

Id.

The Secretary contends that whether Agapito's activities were covered by the Mine Act is factually intensive because Agapito will argue that this issue depends upon both the location and scope of the services it provided. To counter Agapito's arguments, the Secretary states that she would be required to "introduce evidence relating to what services Agapito contracted to perform, what occurred in practice, and what limitations, understandings, agreements and beliefs Agapito and [the mine owner/operator] had in evaluating the conditions at Crandall Canyon and [in] shaping and modifying the engineering plans." (S. Br. in support of motion at 20). The Secretary contends that specific evidence would have to be introduced relating to the on-site visits Agapito made to the mine and how and why the mining plan was modified following these visits. *Id.* She states that these "substantive questions and the evidence relating to them are precisely what the U.S. Attorney has asked not be prematurely addressed in this proceeding at this time." *Id.*[4]

Agapito maintains that, because the Secretary's investigative and enforcement authority go hand in hand, the accident investigation report may be used to determine whether Agapito was an independent contractor. The fact that several people failed to participate in MSHA's accident investigation is irrelevant. Agapito again states that additional discovery is not necessary to resolve the issue at hand. Agapito states that "the nature of the specific services provided by Agapito and the frequency of visits to the mine . . . are already either in the Secretary's possession, available through a Rule 30(b)(6) deposition of Agapito, or available through the Court-ordered hearing." (A. Response at 20). Agapito states that it is willing to enter into one or more protective orders to preserve the confidentiality of information.

The letter from the U.S. Attorney seems to focus almost exclusively on concerns over discovery taken by Apagito. As the administrative law judge in this case, I have the authority to control and limit discovery, to keep documents under seal, and to enter protective orders. It appears to me that the question whether Agapito was an independent contractor in this instance raises rather simple factual issues. The Commission's and the 10th Circuit's decisions in *Joy Technologies, Inc.* analyze the issues involved. (17 FMSHRC 1303 (August 1995); 99 F.3rd 991 (10th Cir. 1996)). The Secretary maintains that whether Agapito was an independent contractor could possibly turn, at least in part, on what the owner/operator of the Crandall Canyon Mine thought about the engineering plans and whether the owner/operator modified these plans. Although such facts may be important when litigating the underlying citation, I cannot see how

---

[4] It is interesting to note that the U.S. Attorney clarified his position on September 5, 2008, to allow the heirs of the disaster victims and injured rescuers to continue to pursue civil litigation against the mine's owners, operators, and consultants. *Mine Safety and Health News*, Vol. 15, No. 16, p. 275, September 15, 2008 (reprinting article from *The Salt Lake Tribune)*. A representative of the U.S. Attorney stated that the stay request applies only to "pending administrative enforcement actions in which MSHA is seeking to obtain monetary penalties against the business organizations associated with the mine." *Id.* It would "not apply to civil court proceedings brought by the victims or their families." *Id.*

these questions will be significant when determining whether Agapito was an independent contractor.

The 10th Circuit's analysis in *Joy Technologies* is rather straightforward. The court held that "independent contractor status is not to be based on the existence of a service contract or control, but on the performance of significant services at the mine. . . ." 99 F3d. at 998. The court rejected the approach set forth in *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985) and followed the approach taken in *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285 (D.C. Cir 1990). Chief Judge Robert J. Lesnick adopted the reasoning of the D.C. and Tenth Circuits in finding that an engineering company that prepared mining permits for the owner/operator of an underground coal mine was an independent contractor under the Mine Act. *Black Wolf Coal Co., Inc.,* 28 FMSHRC 699, 711-714 (July 2006). He noted that mining operations require engineering support. He stated that, although the engineering contractor "was not hired to create a map for submission to MSHA, it was hired to perform necessary services required in the overall extraction process." *Id.* Judge Lesnick held that since the engineering contractor "performed significant services rendering more than *de minimis* ties to mining operations" it was an independent contractor. *Id.* at 714. Although this decision is not binding on me, it is a logical application of the 10th and D.C. Circuit decisions to the work of engineering consulting firms at underground coal mines.[5] The Crandall Canyon Mine and Agapito's offices in Grand Junction, Colorado, are in the Tenth Circuit.

The Commission is charged with the responsibility of adjudicating disputes under the Mine Act. In creating the Commission, Congress made it quite clear that it expected the Commission to hear and decide cases in an expeditious manner. For example, the Commission was created with five commissioners with the authority to act in panels of three. The Senate Report made clear that "the Committee strongly believes that it is imperative that the Commission strenuously avoid unnecessary delay in acting upon cases." S. Rep. 95-181, at 48 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 636 (1978). Moreover, in discussing the role of administrative law judges in the adjudication of cases, the Report states that judges must give the parties "every reasonable opportunity to adequately develop the record . . . consistent with [their] duty to resolve matters under dispute in an expeditious manner." *Id.* at 637. Thus, Congress intended the Commission and its judges to act with reasonable promptness. To this end, the Commission stated that its procedural rules "shall be construed to secure the just, speedy, and inexpensive determination of all proceedings . . . ." 29 C.F.R. § 2700.1(c).

---

[5] The Seventh Circuit adopted the reasoning of the D.C. and Tenth Circuits when it held that a company that regularly delivered steel to a mine "cannot be characterized as an independent contractor providing services at a mine because the minimal activity performed . . . does not rise to a level that can be construed as services performed at a mine." *Northern Illinois Steel Supply Co. v Sec'y of Labor*, 294 F.3d 844, 849 (7th Cir. 2002).

It has been my experience that criminal investigations in cases involving fatal accidents at the nation's mines are always very time consuming. I have never had such a case out of Utah, but in other instances, the criminal matters were not resolved until a few months before the expiration of the statute of limitations.

I believe that it is in the interest of the parties to determine whether Agapito was an independent contractor before the criminal investigation is completed.[6] In addition, I do not agree with the Secretary's characterization that the issue is factually complex. For example, she states that because Agapito will apparently argue that "its actions did not constitute services if the mine operator could modify them," the Secretary will be required to conduct discovery to determine whether this argument has merit and whether Agapito's services were actually "necessary." (S. Reply Br. at 7). The Secretary contends that such discovery could prejudice the U.S. Attorney's criminal investigation if taken at this time. Whether the services or recommendations provided by Agapito were modified by the owner/operator relates to the allegations in the citation rather than to Agapito's status as an independent contractor. Tenth Circuit and Commission precedent make clear that the issue is whether Agapito provided significant services to the owner/operator with the result that it had more than a *de minimis* association with the coal extraction process or other work taking place at the Crandall Canyon Mine. The status of a mining or engineering consultant as an independent contractor does not change because its recommendations are subsequently rejected or modified by the owner/operator.

The Secretary insists that she needs to take discovery to pin down the key facts. It is clear that the Secretary already has a great deal of information concerning the relationship between Agapito and the mine's owner/operator. In addition, Agapito states that it would not object to the Secretary taking a deposition of the company under Rule 30(b)(6) of the Federal Rules of Civil Procedure. I recognize that MSHA's accident investigation report was not written with the intention of setting forth all of the information necessary to establish that Agapito was acting as an independent contractor as that term has been interpreted under the Mine Act. I credit the Secretary's stated need to take discovery on this issue. Nevertheless, the Secretary has not totally convinced me that her discovery on this narrow issue will seriously interfere with the pending criminal investigation, especially since I have the authority to control discovery and limit the dissemination of information through protective and other orders.[7]

---

[6] On September 24, 2008, I denied Agapito's motion for expedited consideration of this issue.

[7] The parties presented many other arguments with respect to the issues presented. Indeed, the total length of the parties' briefs is about 75 pages. As a consequence, I have not addressed every argument or issue raised. For example, Agapito argued that what it calls the "primary administrative jurisdiction doctrine" requires that the Commission decide whether Agapito is an independent contractor before a U.S. District Court may address the issue. This argument is rejected as are all other arguments that are inconsistent with this order.

In my order of September 12, 2008, I evaluated the Secretary's request for a stay using the factors established by the Commission in *Buck Creek Coal, Inc.*, 17 FMSHRC 500 (April 1995). Taking into consideration the information provided by the parties in response to the reconsideration motion, I enter the following additional findings. It is clear that there will be evidentiary information that is common to both this proceeding and the criminal case. The citation at issue here will be at issue in a criminal case. Moreover, whether Agapito was an independent contractor under the Mine Act will be an issue likely to be raised in a criminal proceeding. I do not know whether a criminal indictment is imminent, but the criminal investigation is either imminent or it has already started. The Secretary and the office of the U.S. Attorney state that permitting this case to go forward, even on the limited issue of Agapito's status as an independent contractor, could prejudice the criminal investigation. The Secretary claims that adjudicating the independent contractor issue separately from the merits of the citation will not be an efficient use of the agency's resources. In addition, it is quite possible that key employees of Agapito will assert their privilege against self-incrimination, if the Secretary seeks to depose them, which will prevent her from presenting the evidence she believes that she needs to establish Agapito's independent contractor status. Finally, the public interest favors the expeditious resolution of Commission proceedings, but not if such resolution seriously interferes with criminal proceedings.

Based on the above, I am granting the Secretary's request for reconsideration and I am staying this case until February 27, 2009. No discovery shall be permitted during the stay. The Secretary should understand that I will not automatically extend the stay. On or before February 20, 2009, the Secretary shall file a detailed accounting of the status of the criminal investigation and when it is expected to be completed. At the expiration of this stay, I may require the Secretary to conduct any discovery she determines is necessary on the independent contractor issue while continuing to prohibit Agapito from conducting discovery. Agapito is willing to decide the issues raised on the basis of the MSHA accident investigation report. Moreover, Agapito already knows what services it provided to the owner/operator of the Crandall Canyon Mine. As stated above, the U.S. Attorney is concerned that discovery taken by Agapito, rather than by the Secretary, could interfere with the criminal proceedings. In this same report, due February 20, the Secretary shall raise any objections to this discovery proposal and, if objections are made, explain how discovery taken on the independent contractor issue would interfere with the criminal matter. Agapito will be permitted to respond to this report.

III. ORDER

For the reasons set forth above, the motion for reconsideration is **GRANTED** and this proceeding is **STAYED** until **February 27, 2009**. The Secretary **SHALL** file the report required in the above paragraph on or before **February 20, 2009**. The parties shall initiate a conference call on or soon after February 27, 2009, to discuss the status of the case and the criminal investigation. The parties shall feel free to initiate a conference call to discuss this case at any time and shall do so before filing any motions.

Richard W. Manning
Administrative Law Judge

Distribution:

Derek J. Baxter, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209-2296

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202

Mark N. Savit, Esq., Patton Boggs, 1801 California St, Suite 4900, Denver, CO 80202

RWM